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HONOR ROLL

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Best Overall:	Officer Wendy L. Davis - Bremerton Police Department
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Best Firearms:	Officer Patrick F. Beall - Centralia Police Department

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WASHINGTON STATE SUPREME COURT

UCSA FORFEITURE OF PROCEEDS NOT SUBJECT TO DOUBLE JEOPARDY RESTRICTION; ALSO, PC-TO-SEARCH AND POWER-RECORDS-ACCESS ISSUES RESOLVED FOR STATE

State v. Cole, 128 Wn.2d ___ (1995)

Facts and Proceedings: (Excerpted from Supreme Court opinion)

> In early June 1992, the King County Police Drug Enforcement Unit received a telephone call from a citizen informant who believed a neighborhood residence in Issaquah, Washington, was being used to grow marijuana or for some other illegal activity. According to Detective Joseph Gaddy, who investigated the tip, the informant reported the house appeared unoccupied, but some young men came two or three times a week, staying for only a few minutes each time. The informant described the young men's appearances and one of their automobiles. The informant also stated he or she and other neighbors had smelled something unusual apparently coming from the house.
>
> Gaddy drove to the house to investigate. The yard was overgrown, the house did not look lived in, and the basement windows were covered. Although it was daylight, the porch light and an interior light were left on. There was no response to Gaddy's knock on the front door. As he walked past the garage, Gaddy heard a humming sound he recognized as a ballast for florescent or metal halogen lights and fan motors operating inside the garage. Gaddy then stepped around the side of the garage to the electric meter for the house, located approximately two feet from the corner of the house nearest the driveway. The electric meter was spinning very rapidly, faster than Gaddy believed would be observed if the house were occupied. He also smelled the odor of growing marijuana. As Gaddy returned to his car, he noticed a new metal chimney erected some distance away from the older masonry chimney.

The next day, based on these observations, Gaddy filed an affidavit for a search warrant for electrical utility and telephone account information for the suspect residence. The affidavit summarized Gaddy's training and experience, the allegations made by the citizen informant, Gaddy's observations of the residence on June 9, 1992, and the basis for his suspicion that a marijuana grow operation existed in the house. The affidavit did not reveal the identity of the citizen informant, although the police knew who the informant was.

A search warrant for the power account information issued on June 12, 1992, from the King County District Court. The power records obtained from Puget Sound Power and Light Company showed high power consumption, averaging 7,000 KWH per two-month billing period or about $400 worth of power, contrasted with an average of about 1,900 KWH per billing period, worth about $95, over the last six months of the prior tenants' occupancy in the residence.

On June 30, 1992, the King County District Court issued a search warrant for the suspect residence and two automobiles seen frequently at the residence. The warrant was based upon an expanded affidavit by Gaddy, which contained a summary of the information obtained from the power consumption records, and added the results of further investigation into the allegations in his previous affidavit. The affidavit described a visit to the residence on June 10, 1992, by Officer J.R. Hall, during which Hall reported smelling growing marijuana while standing in a neighbor's yard approximately ten feet from the suspect house. The affidavit described Hall as a member of a proactive unit addressing street level narcotics trafficking, who, in more than two years as a police officer, had been involved with numerous marijuana grow operations and was familiar with the smell of growing marijuana.

The Gaddy affidavit also contained additional information from the citizen informant identifying three automobiles used by the persons frequenting the house, and providing the license plate number for two of those vehicles. Gaddy stated he believed the informant to be very reliable because the informant had lived in the neighborhood for several years and worked in the community, had extended family in the community, had no criminal record, and came forward voluntarily and without requesting compensation.

The affidavit identified the registered owner of one vehicle as Fred Hatcher, who had been arrested twice and convicted once for violation of the Uniform Controlled Substances Act, and whose auto repair business appeared to be a front for cocaine distribution. The affidavit included additional information recorded during surveillance of the residence, including visits of various individuals. Gaddy's investigation revealed a connection between Hatcher and Cole. The affidavit also reported Cole had two prior convictions for violation of the Uniform Controlled Substances Act and described Cole's resistance during a prior arrest.

On June 30, 1992, officers with the King County Drug Enforcement Unit executed the warrant to search the suspect house. They discovered Cole at the house and arrested him. During the search, the offices discovered evidence of a marijuana grow operation, including marijuana plants and grow equipment.

On July 1, 1992, as authorized by RCW 69.50.505, police officers seized a 1988 Chevrolet truck, one 1990 Kawasaki jet ski, one Yamaha jet ski, and a cellular telephone, and notified Cole of their intention to seize a 1976 Sanger ski boat and homemade boat trailer, all in Cole's apparent possession, based on probable cause to believe this property had been acquired with proceeds traceable to violations of RCW 69.50. On January 27, 1993, the court entered an agreed order forfeiting Cole's interest in the truck jet skis, and cellular telephone, and directing the return of the ski boat and trailer to him.

On December 30, 1992, Cole was charged with one count of violating the Uniform Controlled Substances Act: possession of marijuana with intent to deliver. Cole moved to suppress evidence from the search of the residence, based on lack of probable cause. He argued the power records were obtained in violation of RCW 42.17.314. He also asserted there was no showing the informant was knowledgeable and reliable. Finally, he contended Gaddy's search of the area beyond the corner of the house was a warrantless search of the curtilage of the property. The trial court rejected the first two contentions, but accepted Cole's argument that Gaddy was in as a constitutionally protected area of the curtilage of the house when he observed the electrical meter and smelled growing marijuana. After redacting this evidence, the trial court nevertheless found sufficient probable cause to support the search warrant.

On May 21, 1993, Cole was convicted as charged upon stipulated facts. He then moved to vacate his conviction and dismiss the charge on double jeopardy grounds. The trial court denied the motion.

ISSUES AND RULINGS: (1) Do constitutional double jeopardy restrictions apply such that an earlier civil forfeiture of proceeds from illegal drug activity bars a criminal prosecution for that same illegal drug activity? (ANSWER: No)**[LED Editor's Note: Justices Alexander, Guy, and Utter dissent on this issue, arguing that double jeopardy does apply to forfeiture of proceeds. There is no dissent on any of the rulings on the other issues in the case.]**; (2) Does the search warrant affidavit in the Cole case contain sufficient information about the anonymous citizen-informant to meet the credibility prong of the two-pronged Aguilar-Spinelli test for informant-based probable cause? (ANSWER: Yes); (3) Does the search warrant affidavit provide sufficient information for probable cause purposes to show the ability of the second detective to recognize the smell of growing marijuana? (ANSWER: Yes); (4) Is it lawful for police to obtain electrical power usage records with a search warrant instead of using a written request in compliance with RCW 42.17.314? (ANSWER: Yes) Result: affirmance of King County Superior Court conviction for possession of marijuana with intent to deliver.

LED Editor's Note: The Cole case was consolidated with another King County case involving a proceeds forfeiture/double jeopardy issue -- State v. Szymanowski. In Szymanowski, the State Supreme Court was unable to determine whether the property forfeited was in fact "proceeds", or was instead tainted property forfeited for its use in facilitation of drug crime. For that reason, the Supreme Court remanded the Szymanowski case to the trial court for fact finding hearings on the issue of the status of the forfeited property. We do not address the Szymanowski case in the following discussion.

ANALYSIS:

(1) Double Jeopardy

On the rationale that one who possesses proceeds from his illegal activity has nothing to which the law entitles him, a majority of the State Supreme Court holds that it is not punishment to seize and forfeit such proceeds. Accordingly, there can be no double jeopardy in prosecuting the person criminally for the same activity on which the forfeiture of proceeds is based. **[LED EDITOR'S NOTE: This ruling on double jeopardy does not relax the double jeopardy restrictions applied to forfeiture of tainted property based on use of property in illegal activity. For an explanation of general "double jeopardy" and "excessive fines" restrictions on forfeiture, see October 1994 LED article beginning at page 2.]**

(2) Citizen Informant Credibility

The majority opinion explains as follows the majority's view that the affidavit established the credibility of the citizen informant:

> Cole claims the trial court erred in finding probable cause based on unreliable allegations made by an anonymous informant. He claims the affidavit's statement as to the informant's reliability is a "generic recitation," insufficient to demonstrate reliability. Washington courts adhere to the so-called Aguilar-Spinelli test: "[W]hen the existence of probable cause depends on an informant's tip, the affidavit in support of the warrant must establish the basis of the informant's information as well as the credibility of the informant." State v. Ibarra, 61 Wn. App. 695, 698 (1991) **[Nov. '91 LED:06]**.
>
> Different rules apply to establish the credibility of a confidential informant depending on whether the informant is a professional informant or a private citizen. In either instance, when the informant's identity is unknown to the magistrate, there exists concern that the information may be coming from an "anonymous troublemaker." That concern is substantially decreased, however, where information in the affidavit demonstrates the informant is truly a citizen informant who is not involved in the criminal activity or motivated by self-interest. Consequently, if a citizen informant wishes to remain anonymous, the affidavit must contain background facts to support a reasonable inference that the information is credible and without motive to falsify. State v. Wilke, 55 Wn. App. 470 (1989) **[Dec. '89 LED:17]** If the informant's identity is known to the police, but not to the magistrate, the informant may be credible even though the affidavit does not state specifically why the informant wishes to remain anonymous. State v. Dobyns, 55 Wn. App. 609 (1989) **[Jan. '90 LED:18]**.
>
> In this case, the Gaddy affidavit included the following facts about the informant: (1) the informant lived in the neighborhood of the house that was the subject of the requested search; (2) the informant lived in that neighborhood for several years; (3) the informant worked in the community; (4) the informant had extended family who lived in the community; (5) the informant did not have a criminal record; (6) the informant came forward voluntarily; (7) the informant did not request compensation; and (8) Gaddy knew the informant's identity. According to the

affidavit, the informant's information was quite specific, describing appearances of automobiles and persons, their activities, and even the license plate numbers of the vehicles. The affidavit also described subsequent investigation by police officers that corroborated the information given by the informant, including the suspicious appearance of the residence, a pattern of visitation to the residence consistent with drug-related activities, and a link between the vehicles reported by the informant and observed by officers and persons with prior convictions for narcotics violations.

We believe that the recitation here was more complete and provides greater validation than the factual allegations in Ibarra and State v. Franklin, 49 Wn. App. 106 (Div. III, 1987) **[Dec. '87 LED:15]**, that were found to be insufficient, and was more in the nature of the information provided about the informant in Dobyns. The information here is sufficient to support an inference of reliability, thereby satisfying the concerns raised in Ibarra. Relying on the informant's allegations to find probable cause was consistent with Dobyns and was not an abuse of discretion.

[Some citations omitted]

(3) Smell of Growing Marijuana

The majority opinion analyzes the "smell" issue as follows:

Cole argues the affidavit did not contain information sufficient to demonstrate Hall had the necessary skill, training, or experience to identify the odor of growing marijuana. The affidavit states Hall had been a King County Police Officer for over two years, had been involved with marijuana grow operations in that time, and was familiar with the smell of growing marijuana. State v. Olson, 73 Wn. App. 348 (1994) **[March '95 LED:15]** is on point. The court held as sufficient an affidavit's statement that a state patrol detective was familiar with the odor of growing marijuana and had participated in the seizure of indoor grows. Acknowledging that such an assertion must be based on more than a mere statement of personal belief, the Olson court held a statement that an officer with training and experience actually detected the odor of marijuana provides sufficient evidence, by itself, constituting probable cause to justify a search. Gaddy's affidavit adequately sets forth Hall's training and experience; the trial court did not abuse its discretion in finding probable cause.

[Some citations omitted]

(4) Power Records Obtained With Warrant

Ruling that the power usage records may be lawfully obtained with a search warrant, the majority justices explain:

Cole also argues the search warrant Gaddy obtained for power consumption records of Puget Sound Power and Light Company does not comply with the procedures in RCW 42.17.314, which provide that power records may not be disclosed unless law enforcement provides a written statement to the utility that a

crime may have been committed by the person to whom the records pertain and the records are relevant to the alleged crime. Relying primarily on State v. Maxwell, 114 Wn.2d 761 (1990) **[Sept. '90 LED:03]** to support his contention that RCW 42.17.314 provides the exclusive means through which police can obtain power consumption records, Cole argues that the records were inadmissible to show probable cause. Cole's reliance is misplaced. Maxwell held only that a police officer's telephone request did not satisfy the statute's requirement that the request be made in writing. In contrast, the officers in this case presented the utility with a search warrant stating that a judge had determined, based upon a sworn affidavit, that there was sufficient probable cause to believe a violation of the Uniform Controlled Substances Act had been committed by a person or persons who had contracted for service at a particular address, and that evidence of that violation existed in the utility's records for that address.

The search warrant here satisfied the requirements of RCW 42.17.314 because the statute requires only that the police indicate in writing an articulable suspicion of illegal activity. A search warrant requires the critical additional step of proving to an impartial magistrate that there is probable cause to believe a crime has been committed.

Allowing power consumption records to be obtained by means of a search warrant also satisfies the policy underlying RCW 42.17.314. The concern of the Legislature in enacting RCW 42.17.314 was to prevent general fishing expeditions by governmental authorities through power usage records. State v. Maxfield, 125 Wn.2d 378 (1994) **[Feb. '95 LED:02]**. It is not a fishing expedition when a law enforcement officer demonstrates both reasonable suspicion of criminal activity and an inference that particular evidence of that offense is located in a particular place, sufficient to persuade an impartial magistrate that there is probable cause to issue a search warrant. Cole cannot show any prejudice where the State obtained the records in a proceeding that had a more *stringent* standard for disclosure than RCW 42.17.314.

[Some citations omitted; emphasis by Court.]

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) JAILERS DID NOT INTERFERE WITH DWI ARRESTEE'S RIGHT TO ADDITIONAL BAC TEST -- In State v. McNichols, 128 Wn.2d 242 (1995), a unanimous State Supreme Court reverses a Court of Appeals decision (see 76 Wn. App. 283 **March '95 LED:13**) and holds that the actions of jailers did not interfere with defendant McNichols' right to an additional test for breath or blood alcohol level.

The Supreme Court describes what happened at the stationhouse and jail after McNichols had been arrested and advised of his Miranda and implied consent rights:

> Before submitting to the BAC, McNichols spent twenty minutes attempting to telephone his father. Unable to reach him, McNichols then called the on-duty

public defender. At 12:09 a.m. McNichols submitted to the BAC test. The first sample registered .26. The second sample was given at 12:13 a.m. and registered .24. Shortly thereafter McNichols was transferred to the Spokane County Jail for booking.

At the jail McNichols asked jail officials for a blood test. This request was noted, at McNichols' insistence, on a jail processing form. The booking officer Terry Chavens, testified that while he could not recall the exact information he gave McNichols regarding additional testing, he did recall informing McNichols that jail personnel did not perform blood tests. Further, Chavens said that as part of a routine statement given to DWI suspects it was possible that he informed McNichols that he could arrange to have his physician draw blood and that he would have use of the telephones to "notify or arrange for a blood test once he's released from the facility." Between 12:30 a.m. and 1:45 a.m. McNichols had access to a telephone.

Another jail official, Officer John Holmes, testified that he overheard McNichols request a blood test from Chavens. Holmes stated that he heard Chavens explain to McNichols "that the jail does not administer blood tests and that he should have taken that process up with the arresting officer."

At approximately 1:45 a.m. it was determined that McNichols qualified for release on his own recognizance. McNichols called a friend to arrange for a ride home. At about 2:40 a.m. he was given his personal effects. He left the jail with a friend at approximately 3:00 a.m. and went home. McNichols stated that he chose not to have a blood test after his release from jail for he believed that too much time had passed since his arrest for him to obtain an accurate result.

Prior to his trial for DWI, McNichols lost his district court motion to dismiss the DWI charges. His motion was based on his claim that jailers had interfered with his right to obtain a second test, McNichols was convicted of DWI. However, he prevailed on his motion on appeal to the superior court, and the Court of Appeals subsequently affirmed the superior court ruling. The Court of Appeals' opinion purported not only (A) to impose a duty on police officers and jailers to not interfere with a DWI (now DUI) arrestee's right to a second test, but also, (B) to impose an affirmative duty on the police and jail personnel to advise the person of his rights in this regard.

In reversing the superior court and Court of Appeals' rulings, the State Supreme Court explains:

RCW 46.61.506(5) provides:

> The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of his or her own choosing administer one or more tests in addition to any administered at the direction of a law enforcement officer. . . .

This provision grants a DWI suspect a right to additional testing to allow the suspect "to obtain evidence with which to impeach the results of the state-administered test." This is in keeping with a defendant's constitutional due process right to gather evidence in his own defense.

While "law enforcement authorities have no duty to volunteer to arrange for testing, they must not thwart an accused's attempts to make such arrangements." **[City of Blaine v. Suess, 93 Wn.2d 722 (1980) Sept. '80 LED:02]**. In Blaine, the defendant, a Swiss national with poor English skills, communicated to the arresting officer his desire to obtain additional testing. Police assured the defendant that he would be transported to a local hospital for testing. On route to the hospital, the defendant again reiterated his wish to additional testing. At that point the officer informed the defendant that he was going to jail and no testing would be available at the facility. The defendant was held overnight and made no further requests for additional testing. At issue was whether the defendant was afforded a reasonable opportunity to gather evidence in his own defense.

In resolving this issue the [Blaine] court reasoned that since the defendant "was in custody, he had no realistic opportunity to be tested except by stating his wish to the authorities." Moreover, the court found that the defendant "did everything a reasonable person could do under the circumstances to implement his right to an additional test." The court determined that whether a defendant was afforded that opportunity "depends heavily on the particular circumstances." The court dismissed the case after finding that the police did unreasonably interfere with the defendant's efforts to obtain probative evidence.

In contrast, the court of appeals in State v. Reed, 36 Wn. App. 193 (1983) **[May '84 LED:07]**, found that the officers' conduct in refusing to transport a suspect to the hospital for an additional test did not constitute interference. In that case, the defendant was arrested for driving while intoxicated and was transported to the Grandview police station. The defendant submitted to a breath test and was issued a citation. He then made two requests to be transported to one of two local hospitals, both within approximately seven miles from the station, for additional testing. Police denied his requests. The defendant had unrestricted telephone access and made several calls. A Grandview police officer, acting on his own accord, arranged for a licensed physicians' assistant to go to the jail to draw a blood sample, but the defendant rejected that offer and again expressed his desire to be taken to the hospital. At issue was whether the police had an affirmative duty to transport the accused to a hospital to obtain additional tests. The court, relying on Blaine, concluded that under the circumstances police had not unreasonably thwarted defendant's attempts to obtain additional testing by not transporting him to the hospital. The court also noted that its holding was not intended to preclude the transportation of a defendant to a hospital under different circumstances.

We conclude that whether the State has unreasonably interfered with a DWI suspect's right to additional testing under the implied consent laws must be determined on a case by case basis. While "detrimental reliance" on a promise made by an arresting officer is a factor to consider, as the State suggests, it is not determinative. In Blaine this court was also influenced by the fact that the suspect was a Swiss national with poor English skills, that the officer told the suspect he could not have a blood test in the jail, and the suspect was held in jail overnight. When the court in Reed denied suppression of the BAC results, it was influenced by the accessibility of a telephone and the offer by the officer to arrange for a technician to draw blood at the jail.

> In the present case the authorities did not promise to assist McNichols in securing additional testing. **The authorities have no duty to volunteer to arrange for testing.** Although an inference may be drawn from the corrections officer's statements to McNichols that he had missed his only opportunity for a blood test by failing to make his request to the arresting officer, he was also given unlimited access to the telephone and told that he could make his own arrangements. Unlike the suspect in Blaine, McNichols speaks English. And most importantly, McNichols understood and exercised his right to counsel earlier that evening. That McNichols felt misled by authorities could have easily been remedied had McNichols contacted the on-duty public defender to whom he had turned earlier for advice. For whatever reason he decided not to call a qualified person to take a blood test or to seek advice of counsel. **We find that under the circumstances the jail personnel did not unreasonably interfere with McNichols' right to obtain additional testing.**
>
> Finally, McNichols claims that jail personnel intentionally delayed his release from jail, but he offers no evidence to support this contention. The arrest occurred on the weekend, the busiest time of the week for jail personnel. McNichols was processed and determined to be qualified for release on his own recognizance. **We find that the jail personnel did not interfere with McNichols' efforts to obtain additional testing by delaying his release from custody.**

[Some citations omitted; emphasis added by LED Ed.]

Result: Spokane County District Court DWI conviction reinstated.

(2) **EVIDENCE SUFFICIENT TO SUPPORT CONVICTION UNDER DANGEROUS WEAPONS STATUTE (RCW 9.41.250)** -- In State v. Myles, 127 Wn.2d 807 (1995) the State Supreme Court votes, 6-3, to: (1) reject a constitutional due process (void-for-vagueness) challenge to the "dangerous weapons" law at RCW 9.41.250, and (2) hold that there is sufficient evidence in the trial court record to support defendant Dalona S. Myles' conviction under that statute.

RCW 9.41.250 provides that it is a gross misdemeanor to "furtively carry with intent to conceal any dagger, dirk, or other dangerous weapon . . ." The majority opinion for the Supreme Court finds the statute to be sufficiently clear to meet due process requirements. Then, on the sufficiency-of-the-evidence issue, the majority rules that the evidence was sufficient to support Myles' conviction. The majority's description of the pertinent facts is as follows:

> Officer Angela Johnson, testified that on September 1, 1992, she was dispatched to the intersection of 30th Avenue and East Republican in Seattle as a result of a 911 call reporting a fight or disturbance. Upon arrival, Johnson saw Myles, then age 16, and two or three other people at a corner of the intersection, and a larger group of five to ten people on the other side of the street. Johnson testified that Myles was yelling threats and swearing at the larger group of people. Johnson got out of her car, approached Myles, and asked what was going on. Johnson testified that Myles said "I'm going to kick your ass, you . . . bitch." Johnson testified that at the time Myles had her hands in her coat pockets and "appeared to be reaching for something . . .." Johnson testified she thought it might be a weapon, and testified

> that as she approached, Myles continued to swear and act aggressive toward Johnson.
>
> Officer Johnson took Myles to the patrol car, and patted her down for weapons by feeling open handed along the outside of her clothing. When she patted down the left side of Myles' coat, she felt "something that was hard" which she thought might be a weapon. The object was a paring knife with a fixed serrated blade. The knife was not found in a pocket into which Myles had put her hands, but instead was found in the left inside pocket behind one of the pockets where Myles' hands were.

[Some citations to record omitted]

After considerable discussion of the meaning of the terms of the statute, particularly the term, "furtively," the majority explains in part why it believes the above-described evidence is sufficient to support the conviction:

> The evidence supports the finding that Myles furtively carried the knife. Undisputed evidence shows that the knife was carried in an inner pocket, an unusual and suspicious place to carry a knife.
>
> The evidence also supports the finding that Myles carried the knife with the intent to conceal it. In addition to the evidence set forth above, other findings, supported by the evidence, are that Myles was a 16-year-old girl on the streets of Seattle at 1 a.m., in the presence of other people in an inhospitable situation. The knife was hidden from view, in an inner pocket, closest to her person. The knife was a paring knife, i.e., a kitchen knife, secretly carried at a time and place where a kitchen knife would not generally be used as a kitchen knife.

[Footnote omitted]

Justice Alexander writes a dissenting opinion, joined by Justices Pekelis and Johnson: (1) agreeing with the majority on the due process question, and (2) disagreeing on the sufficiency-of-the-evidence issue.

Result: King County Superior Court conviction under RCW 9.41.250 affirmed (Court of Appeals' decision reversed).

(3) **SEATTLE DUI ORDINANCE WITH .08 BAC STANDARD INVALID --** In Seattle v. Williams, 128 Wn.2d ___ (1995) the State Supreme Court holds, in a 6-3 ruling (Justices Talmadge, Dolliver and Smith in dissent), that the uniformity language in the state traffic code (RCW 46.08.020, .030) precludes enforcement of the City of Seattle's DUI ordinance setting a lower BAC standard (.08 instead of .10) for DUI. The State Legislature must expressly authorize such a local ordinance, the majority rules. Result: Seattle Municipal Court order dismissing DUI charges against George F. Williams affirmed.

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WASHINGTON STATE COURT OF APPEALS

FRISK UNDER TERRY V. OHIO MUST BE BASED ON SAFETY CONCERNS

State v. Alcantara, 79 Wn. App. 362 (Div. I, 1995)

Facts and Proceedings: (Excerpted from Court of Appeals' opinion)

> [A Seattle police officer] testified that on the afternoon of March 21, 1994, he was working bicycle patrol in downtown Seattle when he encountered the defendant. The officer, who was fifty feet away on the west side of Second Avenue, was under the impression Alcantara may have just emerged from a vehicle in a parking lot on the east side of the street. Alcantara walked toward the officer on the opposite side of the street, "intently looking" at what appeared to be a plastic bag in his hand. The officer could not determine the contents of the bag.
>
> [The] officer crossed the street toward Alcantara. When Alcantara saw him approaching, his eyes widened and he "immediately" turned away from the officer. Alcantara made shoving motions in the front of his pants or pocket. [The officer] testified he believed Alcantara was trying to conceal narcotics because he usually saw narcotics packaged in ziplock bags and balloons and had seen deliveries in this area of the city.
>
> [The officer] stopped Alcantara and immediately patted him down, although he acknowledged that he had not observed any weapon prior to the stop. In Alcantara's right front pants pocket, [the officer] felt an object he believed was the plastic he had seen in Alcantara's hand. [The officer] removed the bag, which contained what he believed to be marijuana. After arresting Alcantara and taking him to the West Precinct station, [the officer] asked him if he had any more narcotics in his possession and Alcantara responded that he did. [The officer] then found in Alcantara's pants another plastic bag containing what proved to be rock cocaine.
>
> Alcantara argued in a CrR 3.6 motion to suppress evidence that the search exceeded the proper scope of a Terry stop under the circumstances. Relying on State v. Pressley, 64 Wn. App. 591 (1992), the trial court denied the motion to suppress and found Alcantara guilty of possessing cocaine.

ISSUE AND RULING: Did the officer's suspicion that Alcantara was hiding evidence justify his frisk? (ANSWER: No) Result: reversal of King County Superior Court juvenile court adjudication of guilt for possession of controlled substance.

ANALYSIS: (Excerpted from Court of Appeals' opinion)

> We conclude that the search in this case was not justified under the principles set forth in **[Terry v. Ohio, 392 U.S. 1 (1968)]**. After stopping Alcantara, the officer proceeded to search him immediately. The officer's actions strongly indicate the stop was made for the purpose of searching Alcantara's right front pocket, where he suspected he might find evidence. The trial court did not find that the search was based on concern for a weapon, nor does the State advance such an argument in this court. There was no evidence that Alcantara gave any indication

of being armed and dangerous. The plastic bag could not be mistaken for a weapon. The officer's suspicion that evidence was about to be lost or destroyed was not in itself a sufficient basis for the search.

Accordingly, the search in this case exceeded the permissible scope of a Terry stop and the court erred in denying the suppression motion.

LED EDITOR'S COMMENT: The State had apparently convinced the trial court in Alcantara that the decision in State v. Pressley, 64 Wn. App. 591 (Div. I, 1992) Aug. '92 LED:09 allows a search during a "reasonable suspicion"-based Terry stop solely to prevent destruction of evidence, even if no officer-safety concerns are objectively articulable. The ruling in Alcantara correctly rejects this proposition. Frisks must be supported by specific and articulable facts which show reasonable safety concerns.

"INTENT TO DELIVER" EVIDENCE INSUFFICIENT

State v. Davis, 79 Wn. App. 591 (Div. III, 1995)

Facts and Proceedings: (Excerpted from Court of Appeals' opinion)

> Leroy Thomas Davis was convicted of possession of marijuana with intent to deliver. The evidence against him included possession of a bread sack with six individually wrapped baggies of marijuana, two baggies of marijuana seeds, a film canister containing marijuana, a baggie with marijuana residue in it, a box of sandwich baggies, a pipe used for smoking marijuana, a number of knives, and police testimony that it was not customary for people who simply use marijuana to have that "quantity with that packaging."

ISSUE AND RULING: Was there sufficient evidence to convict Davis of possession of marijuana with intent to deliver? (ANSWER: No) Result: reversal of Grant County Superior Court conviction of marijuana possession with intent to deliver; case remanded to trial court for entry of judgment of guilt for misdemeanor possession of marijuana.

ANALYSIS: (Excerpted from Court of Appeals' opinion)

> It is unlawful in this state for anyone to possess a controlled substance with an intent to deliver. The State, however, must prove that the defendant intended to deliver the controlled substance -- presently or at some time in the future. Because of the nature of the charge of possession with intent to deliver, evidence is usually circumstantial. But evidence of an intent to deliver must be sufficiently compelling that '"the specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability."' As applied here, the intent to deliver must logically follow as a matter of probability from the evidence presented -- evidence in addition to possession.
>
> Convictions for possession with intent to deliver are highly fact specific. Certainly, an intent to deliver might be inferred from an exchange or possession of significant amounts of drugs or money. And there are also a variety of other circumstances which, taken together with possession of a controlled substance, lead to the conclusion that possession was with intent to deliver. *[COURT'S FOOTNOTE:*

State v. Mejia, 111 Wn.2d 892 (1989) (presence of one and one-half pounds of cocaine combined with informant's tip); State v. Taylor, 74 Wn. App. 111 (1994) ("the presence of contraband, together with packaging and processing materials, such as baggies, scales, and cutting agents, sufficiently support a finding of intent to deliver"), review denied, 124 Wn.2d 1029 (1994); State v. Lane, 56 Wn. App. 286 (1989) (one ounce of cocaine, together with large amounts of cash and scales, supported intent to deliver). See State v. Harris, 14 Wn. App. 414 (1975) (possession of five one-pound bags of marijuana, scale and the fact that marijuana was usually sold to dealers by the pound evidenced an intent to deliver).]

In **[State v. Kovac, 50 Wn. App. 117 (Div. III, 1987) Jan. '88 LED:16]**, officers seized seven baggies containing a total of eight grams of marijuana from the defendant. We held the evidence insufficient to justify an inference of intent to deliver. In **[State v. Hutchins, 73 Wn. App. 211 (Div. III, 1994) Oct. '94 LED:11]**, police seized in excess of forty grams of marijuana and charged the defendant with possession with intent to deliver. A police officer testified at trial about the "normal quantity" of marijuana seized in an arrest. We held that "[a]n officer's opinion of the quantity of a controlled substance normal for personal use is insufficient to establish, beyond a reasonable doubt, that a defendant possessed the controlled substance with an intent to deliver."

Here, police discovered six baggies of packaged marijuana, two baggies of seeds, a film canister containing marijuana, a baggie with marijuana residue in it, and a box of sandwich baggies. No quantity of money was found, nor were any weighing devices. The seeds might well suggest an intent to grow marijuana. But there was no evidence Mr. Davis had bought or sold marijuana or was in the business of buying or selling. The marijuana totaled nineteen grams, an amount which could certainly be consumed in the course of normal personal use. The packaging likewise is not inconsistent with personal use. There is not enough evidence before us to infer the specific criminal intent to deliver required by the statute. Intent to deliver does not follow as a matter of logical probability.

[Some citations omitted]

TRIGGER FOR "EXCITED UTTERANCE" HEARSAY RULE NEED NOT BE CRIME ITSELF

State v. Owens, 78 Wn. App. 897 (Div. I, 1995)

Facts and Proceedings:

The Court of Appeals describes the facts relating to the primary evidentiary issue in this case as follows:

During the 16 months after B.K.'s family moved in with Owens, B.K.'s health mysteriously deteriorated. Despite visits to numerous medical personnel the cause remained undiagnosed until Dr. Anderson investigated the possibility that abuse might be the cause. The day he saw Dr. Anderson, B.K. hysterically acknowledged to his mother and his sister that Owens had molested him. He also told his grandparents. The mother and grandmother testified to these facts at trial.

> We agree with the trial court that his mother's testimony was admissible as an excited utterance provoked by the doctor's examination. While we cannot agree with respect to the grandmother's testimony, we do not believe that it was of sufficient importance to require reversal.
>
> B.K.'s mother testified as follows:
>
> On the way [to my parents' home on November 6, 1991], I asked [B.K.] again if he was molested and he told me yes. He just nodded his head yes, and on the way there, [B.K.'s sister] was in the back seat and just held on to him until he was okay, and said it was okay. And then we went to my mom's house, and [B.K.] said that he didn't want us to tell grandma and grandpa, that he would tell them.
>
> Defense counsel objected to this testimony on the ground it was inadmissible hearsay.
>
> B.K.'s grandmother testified that B.K. said to her: "I was molested, Grandma." and that "Greg did this to me, Grandma." Defense counsel objected to this testimony on the ground it was inadmissible hearsay.

The Court of Appeals notes: (1) that the trial court overruled defendant's hearsay objection based on the "excited utterance" exception; (2) that the trial ruled that the child abuse hearsay statute, RCW 9A.44.120, did not apply here because the victim was over the age of 10 when the statements were made; and (3) that the trial court ultimately convicted defendant on two counts of first degree rape of a child.

ISSUE AND RULING: Did the child's statements to his mother and his grandmother following the doctor's office visit constitute "excited utterances" under the hearsay rule? (ANSWER: Yes, as to the statement to the mother, but no, as to the later statement to the grandmother). Result: Snohomish County Superior Court convictions (for two counts of first degree rape of a child) and exceptional sentence affirmed.

ANALYSIS: (Excerpted from Court of Appeals' opinion)

> In order for a statement to qualify as an excited utterance under ER 803(a)(2), three requirements must be met. "First, a startling event or condition must have occurred. Second, the statement must have been made while the declarant was under the stress of excitement caused by the event or condition. Third, the statement must relate to the startling event or condition." State v. Chapin, 118 Wn.2d 681 (1992) **[March '93 LED:06]**. These three requirements were met with respect to the testimony at issue.
>
> With respect to the first requirement, the startling event "need not be the 'principal act' underlying the case." Rather, a subsequent startling event can occur which triggers associations with an original trauma, thereby recreating the original stress and causing the declarant to exclaim spontaneously. The court in Chapin cited a Ninth Circuit case, United States v. Napier, 518 F.2d 316 (9th Cir. 1975), as an illustration of this scenario. In that case, an assault victim was unexpectedly shown a picture of the alleged assailant in a newspaper 8 weeks after the assault.

As a result of being shown the picture, the victim became excited and exclaimed, "'He killed me, he killed me.'" The court held that under the facts before it, the display of the newspaper photograph "qualifie[d] as a sufficiently 'startling' event to render the statement made in response thereto admissible."

The court in Chapin applied this reasoning to a statement made by a resident of a convalescent home suffering from Alzheimer's disease. Each time the resident saw a particular male nurse's aide walk by his room, he would become agitated and verbally abusive. In response to his wife's question as to why he did not like the aide, the resident responded, "Raped me." With respect to the requirement of ER 803(a)(2) that there be a startling event, the court cited Napier and concluded that both the alleged rape and the resident's seeing the aide qualified as a startling event.

Similarly, in the present case, we find that B.K.'s visit to the physician and the intrusive medical examination to which he was subjected during the visit, combined with the pointed questions from his family immediately thereafter as to whether he had been molested, recreated the original stress caused by the acts of abuse and constituted a startling event for purposes of ER 803(a)(2). As the courts in both Napier and Chapin noted, what makes an event startling is its effect upon the person perceiving it. . . . Here, although a medical examination and questions by family members may not be startling events in general, under the facts of this case, we find that these factors combined to recreate the original stress and caused B.K. to utter spontaneous declarations in response to a startling event.

The second requirement under ER 803(a)(2), that the statement be made while the declarant was under the stress of excitement caused by the startling event, is "the essence" of the excited utterance exception and the key to this requirement is spontaneity. B.K.'s statements to his mother disclosing that he had been molested were made immediately after her questioning which, as discussed, was one factor contributing to the creation of the startling event, and the questioning occurred shortly after B.K.'s visit to the physician. Consequently, we find that B.K.'s statements to his mother were made while B.K. was under the stress caused by these startling events.

We cannot say, however, that B.K.'s statements to his grandmother were likewise made with the requisite spontaneity to render them admissible under ER 803(a)(2). The statements were made after some time had elapsed since B.K.'s examination by the physician, and after he had broken down in the automobile with this mother and sister. The statements were made after B.K.'s grandmother comforted him and urged him to tell her what was wrong. The statement identifying Owens as the abuser was not made until even later that day, after B.K.'s grandmother had retired to her bedroom to "get [her] thoughts together" and had spent some time alone in the den. Given the passage of time, B.K.'s statements to his grandmother were not made while he was under the stress of excitement caused by the startling event and were therefore not spontaneous. The admission of evidence of these statements under ER 803(a)(2) was therefore error. But given the other evidence introduced, the erroneous admission of this evidence did not effect the outcome of the trial and was therefore harmless.

> Finally, the third requirement under ER 803(a)(2) was met, namely that B.K.'s utterances related to the startling event. The doctor's visit and the questioning pertained to potential acts of sexual abuse that had been committed upon B.K. by an as yet unnamed perpetrator. In light of the foregoing, the trial court did not abuse its discretion by admitting the testimony under ER 803(a)(2).

[Some citations omitted]

LED EDITOR'S NOTE: The Court of Appeals also rules in this case that testimony from two doctors regarding both: (1) the victim's descriptions of the sexual assault, and (2) the victim's identification of the attacker, were admissible on another ground -- the hearsay exception at ER 803(a)(4) for statements made for purposes of diagnosis or treatment. See the cases on this latter legal issue in the LED entry on State v. Sims immediately below.

"EXCITED UTTERANCE," "MEDICAL DIAGNOSIS" HEARSAY RULE EXCEPTIONS APPLY

State v. Sims, 77 Wn. App. 236 (Div. I, 1995)

Facts: (Excerpted from Court of Appeals' opinion)

"Excited Utterance" Facts

> Seattle Police officer Ronald Martin, responding to a 911 call, met Bellinger on a residential street. She was crying and had an injury to her jaw. With some reluctance, she told the officer that Keith Sims had assaulted her. She said Sims and two other men had chased her from her mother's house after pounding and kicking on the door.

"Medical Diagnosis or Treatment" Facts

> Bellinger sought treatment at Providence Medical Center. Two physicians and a social worker testified that Bellinger, while at Providence, reported she had been beaten up by a man she knew. The social worker said Bellinger told him she had been assaulted in the yard of her mother's neighbor by the man she once lived with.

Proceedings:

At his trial for second degree assault, Sims lost his objections on hearsay grounds to the hearsay testimony of the police officer and medical personnel (regarding the statements described above in the "facts" section). Sims was convicted of second degree assault.

ISSUES AND RULINGS: (1) Does the "excited utterance" hearsay exception of ER 803(a)(2) apply? (ANSWER: Yes); (2) Does the "medical diagnosis or treatment" hearsay exception of ER 803(a)(4) apply? (ANSWER: Yes) Result: King County Superior Court conviction for second degree assault affirmed.

ANALYSIS: (Excerpted from Court of Appeals' opinion)

(1) "Excited Utterance" Exception

> ER 803(a)(2) allows statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition". . . .
>
> . . . The crucial question is whether, when Bellinger made the statement, she was still under the influence of the stressful event to the extent that her statement "could not be the result of fabrication, intervening actions, or the exercise of choice or judgment".
>
> Police Officer Martin arrived on the scene within a few minutes of the dispatch. Witnesses saw Bellinger, crying and upset, talking to the officer "right after" the incident. Her statement was not so detailed as to suggest the exercise of choice or judgment. Her hesitancy in speaking to the officer does not, as Sims contends, negate the spontaneity of her statement.
>
> . . .
>
> We conclude the record supports the trial court's determination that, when Bellinger spoke to Officer Martin, she had no previous opportunity to deliberate or fabricate.

(2) "Medical Diagnosis or Treatment "Exception

> The hearsay rule does not exclude:
>
> > Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
>
> ER 803(a)(4). Sims contends that Bellinger's attribution of her broken jaw to an assault by Sims was not pertinent to diagnosis or treatment.
>
> As a general rule, statements attributing fault are not relevant to diagnosis or treatment. A statement by a child abuse victim attributing fault to a member of the

> victim's immediate household is a recognized exception to the general rule because it is "relevant to the prevention of recurrence of injury".
>
> For similar reasons, a statement attributing fault to an abuser can be reasonably pertinent to treatment in domestic sexual assault cases involving adults. . . .
>
> The testimony demonstrated that Bellinger's physicians and the social worker considered the information attributing fault to be reasonably pertinent to her treatment. The emergency room physician and the social worker testified that Providence Medical Center has a policy of routinely referring assault or domestic violence victims to the social work department. The social worker, Robert Snell, ascertained that Bellinger viewed her relationship with Sims as a continuing one. As part of the treatment plan, Snell encouraged Bellinger to change her relationship pattern and discussed with her how to avoid threatening situations.
>
> Sims objects in particular to the testimony of the surgeon, Dr. Laney, on the basis that Bellinger's statements were not pertinent to his function as a surgeon. Dr. Laney testified that "Patients with . . . abuse problems oftentimes are hard to treat from a pain management standpoint." He said the hospital kept Bellinger for an extra day after surgery "for further social work interaction". His testimony establishes that awareness of the abuse was useful to him in his own responsibility for Bellinger's care.
>
> Under these circumstances, the trial court did not err in admitting testimony from the hospital personnel about Bellinger's hearsay statements as reasonably pertinent to diagnosis or treatment.

[Some citations omitted]

LED EDITOR'S NOTE: Two cases cited by the Court of Appeals in Sims regarding the general admissibility of statements of child abuse victims to medical providers or counselors under the "medical diagnosis or treatment" exception are State v. Butler, 53 Wn. App. 214 (1989); and In re Dependency of S.S., 61 Wn. App. 488 (Div. I, 1991). Other recent cases on this hearsay exception, not cited by the Sims Court, include: State v. Bishop, 63 Wn. App. 15 (Div. I, 1991) Feb. '92 LED:17; State v. Ashcraft, 71 Wn. App. 444 (Div. I, 1993) Feb. '94 LED:14; State v. Florczak, 76 Wn. App. 55 (Div. I, 1994) March '95 LED:17; and Dependency of M.P., 76 Wn. App. 87 (Div. I, 1994) March '95 LED:18.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) **FOLDING DOWN CAR'S BACK SEAT DOES NOT CONVERT PASSENGER SPACE TO "TRUNK" FOR PURPOSES OF "SEARCH INCIDENT TO ARREST" RULE --** In State v. Davis,79 Wn. App. 355 (Div. I, 1995) the Court of Appeals reverses a trial court suppression ruling and rejects defendant's argument that the search of his Chevrolet Suburban following his lawful arrest (for marijuana possession) exceeded the scope allowed under the "search incident to arrest" rule of State v. Stroud, 106 Wn.2d 144 (1986) **Aug. '86 LED:01**.

The facts pertinent to the scope of search issue are described by the Court of Appeals as follows:

> After Davis was arrested, Palmer and Thompson searched the Suburban. The rear bench passenger seat was folded down, so that the entire area behind the front passenger seat was a flat, cargo area. Inside a cooler behind the driver's seat, Thompson found an electronic scale, paper bindles used for packaging cocaine, two baggies filled with a white powder that field-tested positive for cocaine, a metal spoon, and a small strainer.

The Court's analysis of the Stroud scope issue in pertinent part is as follows:

> Davis claims that the evidence suppressed in this case was found in the "cargo/trunk area" of the vehicle and argues that the Stroud rule for passenger compartments "does not encompass the [functional equivalent of the] trunk," . . .. Although various federal cases hold that the passenger compartment does not include the "functional equivalent of the trunk," Davis's reliance upon the federal cases and a Vermont case is misplaced. The cases Davis cites do not involve situations comparable to that found in this case. For example, [one cited federal case] involved a search of the recessed luggage compartment of a station wagon, which was reached by opening the tailgate and lifting a handle set flush in the deck. In the Vermont case, bags containing contraband were found in a hatchback area reached by unlatching an unlocked vinyl cover from inside the backseat. In this case, the unlocked cooler from which the cocaine was seized was found behind the driver's seat.
>
> Davis notes that the rule in Stroud was based on a need to allow officers to search areas within the arrestee's immediate control. He argues that because one must spend time to retrieve items from a container in a rear cargo area, the evidence seized in this case falls outside of the scope of the '"search incident to arrest' rationale."
>
> However, as the court said in **[State v. Boyce, 52 Wn. App. 274 (Div. I, 1988) Nov. '88 LED:02]**, the area within the arrestee's immediate control includes the passenger compartment of a vehicle, because the area generally, though not inevitably, is one from which the arrestee could grab a weapon or other evidence. To find that folding down seats in a vehicle converts the space from a passenger area to "the functional equivalent of a trunk" would defeat the purpose of the Stroud rule, which was intended "to create an easily applied 'reasonable balance' between the need for effective police enforcement and the protection of individual rights."
>
> Because the unlocked cooler was found in the passenger compartment of the vehicle, it should have been admitted as the fruit of a lawful search incident to arrest. The trial court's order suppressing the evidence, therefore, is reversed, and the case is remanded for trial.

[Some citations and footnotes omitted]

Result: Snohomish County Superior Court suppression order reversed; case remanded for trial

on charge of possession of a controlled substance with intent to manufacture or deliver.

LED EDITOR'S NOTE: Next month's LED will digest State v. Mitzlaff, __ Wn. App. ___ (Div. II, 1995), a recent Court of Appeals ruling that the "bright line" Stroud search incident standard for post-arrest motor vehicle searches does not allow a search of the engine compartment of a motor vehicle.

(2) **BICYCLING WHILE INTOXICATED NOT A CRIME UNDER TITLE 46 RCW --** In Montesano v. Wells, 79 Wn. App. 529 (Div. II, 1995) the Court of Appeals rules that RCW 46.61.502, which prohibits driving a vehicle while under the influence of intoxicating liquor or any drug, does not apply to bicyclists. The Court acknowledges that, for limited purposes, bicycles are "vehicles" under Title 46 RCW. However, the Court holds that bicycles are not "vehicles" for purposes of the DUI law at RCW 46.61.502 (and, apparently, not for purposes of any other criminal law prohibitions either). Result: Reversal of Grays Harbor County Superior Court affirmance of District Court conviction of DUI.

(3) **THEFT LAW'S AGGREGATION RULE FOR "COMMON SCHEME OR PLAN" THEFTS REQUIRES PROSECUTION CHOICE -- MAY ONLY CHARGE (1) EITHER ONE UNIFIED FELONY OR (2) ALL GROSS MISDEMEANORS SEPARATELY** -- In State v. Hoyt, 79 Wn. App. 494 (Div. II, 1995) the Court of Appeals upholds the trial court's restrictive reading of the aggregation rule for "common scheme or plan" thefts under chapter 9A.56 RCW.

Defendant Hoyt stole his parents' automatic teller machine (ATM) card and made a series of unauthorized withdrawals over a six-month period. Not one of these withdrawals totaled more than $200, but in the aggregate they totaled $19,838. The prosecutor "bunched" the withdrawals in six groupings and charged Hoyt with five counts of first degree theft, one count of second degree theft and one count of second degree possession of stolen property.

However, the trial court ruled that the State is not allowed to bunch charges in this way under the aggregation rule of chapter 9A.56, and dismissed all but one of the first degree theft charges, as well as the second degree theft charge. The trial court then found Hoyt guilty on the first degree theft charge and on one count of second degree possession of stolen property.

The Court of Appeals rejects the State's appeal from the dismissals. In part, the Court of Appeals' holding on the theft statute's aggregation rule is as follows:

> The sole issue in this case involves RCW 9A.56.010(12)(c), enacted in 1975, which provides:
>
> > Whenever any series of transactions which constitute theft, would, when considered separately, constitute theft in the third degree because of value, and said series of transactions are a part of a common scheme or plan, then the transactions may be aggregated in one count and the sum of the value of all said transactions shall be the value considered in determining the degree of theft involved.
>
> The State argues that RCW 9A.56.010(12)(c) is silent on whether the State can aggregate multiple counts of third degree theft into multiple counts of felony theft; thus, the State argues, this court must resort to common law to resolve the

> aggregation question. Hoyt responds that the statute is unambiguous: multiple incidents of third degree theft occurring as part of a common scheme or plan can be aggregated into *one* count, but only one count, of either first or second degree theft.
>
> The plain working of RCW 9A.56.010(12)(c) supports the trial court's and Hoyt's interpretation. . . .
>
> Two conditions must be met in order for the statute to apply: (1) the defendant must have committed a series of third degree thefts, and (2) the series of third degree thefts must have been "part of a common scheme or plan." RCW 9A.56.010(12)(c). If these two conditions are met, as the trial court found her, then the thefts "*may be aggregated in <u>one count</u> . . .."* RCW 9A.56.010(12)(c) (emphasis added). "[O]ne count" obviously means a *single* count.
>
> Thus, if the defendant commits multiple third degree thefts as part os a common scheme or plan, then the State has the discretion (1) to charge the defendant with multiple counts of third degree theft, *or* (2) to aggregate the counts into a *single* count of felony theft, with the total value of all the thefts determining whether the felony count will be in the first or second degree. Contrary to the State's argument, the trial court's reading does not add language to the statute; rather, this reading correctly interprets the plain language of the statute.

[Footnotes and case citations omitted; emphasis by Court]

<u>Result</u>: Kitsap County Superior Court order dismissing all but one of theft charges affirmed.

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The <u>Law Enforcement Digest</u> is edited by Assistant Attorney General, John Wasberg, Office of the Attorney General. Editorial comment and analysis of statutes and court decisions express the thinking of the writer and do not necessarily reflect the opinion of the Office of the Attorney General or the Washington State Criminal Justice Training Commission. The <u>LED</u> is published as a research source only and does not purport to furnish legal advice.